2001

Jack B. Parson Construction Co. v. The State of Utah : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

19673

JACK B. PARSON CONSTRUCTION CO., a Utah corporation,

Plaintiff-Appellant,

vs.

THE STATE OF UTAH, by and through the DEPARTMENT OF TRANSPORTATION,

Defendant-Respondent.

NO. 19673 ~~17693~~

THE STATE OF UTAH, by and through the DEPARTMENT OF TRANSPORTATION,

Third-Party Plaintiff-Respondent,

vs.

THE AETNA CASUALTY & SURETY CO.,

Third-Party Defendant-Appellant.

REPLY BRIEF OF APPELLANTS

APPEAL FROM A JUDGMENT
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
HONORABLE PETER F. LEARY, JUDGE

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REPLY BRIEF OF APPELLANTS

REPLY TO RESPONDENT'S STATEMENTS OF THE NATURE OF THE CASE, OF THE RELIEF SOUGHT ON APPEAL, AND OF THE DISPOSITION IN THE LOWER COURT

Appellants do not reply to the preliminary statements in respondent's brief, other than to refer the Court to appellants' original brief and to note that by requesting that Thorn

be overruled, respondent has framed the issue in the case: Whether to overrule Thorn by affirming the district court or to follow Thorn by reversing the district court.

REPLY TO RESPONDENT'S STATEMENT OF FACTS

There are two fundamental defects in the Statement of Facts in UDOT's brief. First, it does not agree with the facts found by the trial court. Although Parson disputes the trial court's ultimate decision, the dispute is only over the lower court's conclusions of law, not the findings of fact.

Second, UDOT's Statement of Facts does not comport with the record. It consists of facts taken out of context, factual allegations contrary to or unsupported by the record and legal arguments. In addition, it ignores several salient facts establishing its liability.

What follows is a more specific response to the various allegations in respondent's Statement of Facts, taking them roughly in the order in which they are presented.

UDOT's first assertion, contained in the introductory portion of its Statement of Facts, is that the provision in the Standard Specifications (Section 104.02) regarding supplemental agreements is not a changed conditions clause. This is clearly a legal argument. The issue is not what to call Section 104.02, but whether Parson was entitled to relief thereunder.

UDOT's statement on p. 3 of its brief (unsupported by any citation to the record) that no change of a type contemplated by Section 104.02 was recognized by UDOT is blatantly false. UDOT specifically and expressly admitted that Parson was entitled to a supplemental agreement (Ex. 26-P).

UDOT's statement at the bottom of page 3 that Parson could have used sources other than pit 1 or 2 is false. UDOT admits at p. 17 of its brief that there were no other feasible alternatives.

Contrary to UDOT's present allegations, UDOT has previously conceded that the procedures by which pits 1 and 2 were determined by UDOT to be acceptable were not the procedures required by UDOT's own rules (Tr. 960-963, 990-999). Also, prior consideration of these pits was made pursuant to specifications much less strict than those confronting Parson. Compare the specification table on Sheets 31 and 32 of the Special Provisions (Ex. 3-P) with the predecessor specifications on p. 136 of the 1970 edition of the Standard Specifications (Ex. 1-P). The previous contractors using these pits were also operating under the earlier, looser specifications. The last of these contractors had real problems meeting even the old materials specifications, and the UDOT project engineer recommended that these prospects not be used again (Tr. 1014-1016; Ex. 86-P). At trial, a UDOT employee admitted that

the contractors preceding Parson had removed all of the material described on Sheet No. 2B from these sources. (Tr. 861-862).

The next portion of respondent's Statement of Facts purports to discuss Parson's pre-bid activities and bid. UDOT does not dispute that Parson had less than three weeks within which to investigate prior to its bid. Yet the State alleges that Parson should have conducted an investigation that could not possibly have been performed in this limited period of time.

Notwithstanding UDOT's legal argument on p.4, UDOT did expressly warrant all of the positive representations in the contract documents, thereby accepting the risk of inaccurate representations (Standard Specification Section 102.05). It is these affirmative statements, as confirmed by on-site inspection, that lulled Parson into reliance.

The representation in Special Provision Sheet No. 44 that, "Both Prospect No. 1 and Prospect No. 2 have been previously used for untreated base course and bituminous surface course on previous I-70 projects," is among the most misleading. This reference was obviously intended to show the successful prior use of these pits, not that these pits had been found no longer usable. There was nothing to put Parson or any other reasonable contractor on notice of a problem about which previous contractors should be consulted.

UDOT attempts to make much of the fact that Parson had not worked in the area. However, the bidding was open to all contractors, not just the local ones. Unfortunately, the information presented by the State was extremely misleading to all except those with personal knowledge of the actual conditions.

The allegations that Wilson was told that blend sand might have to be added should be contrasted with the earlier statement in the contract documents that additives need not be used. More significantly, even the addition of blend sand could not turn the prospect No. 2 product into specification material. (Tr. 263-285).

Although Wilson and McDonald may have known generally of the type of documents sometimes found in UDOT files, it is UDOT's Spensko that had the most specific knowledge of that information (Tr. 1020-1022). Yet Spensko made representations in the contract documents contrary to that information. Based on their prior experience, Wilson and McDonald had no reason to expect that UDOT files would contradict UDOT'S representations as to site conditions. It was UDOT'S employee, Spensko, who admitted his "oversight" in failing to communicate accurate information to bidders (Tr. 996-1000).

Even the contract's reference to documents on file (Standard Specification Section 102.05, as amended by the Special Provisions) is misleading. That section does not refer to contractor-generated documents or to general geological data, both of which UDOT claims Parson should have looked for. Moreover, none of the geological evidence submitted at trial challenged the testimony of plaintiff's trial experts as to the variable make-up of the formation and the abrupt, unforeseeable changes in materials encountered by Parson (Tr. 766-770).

UDOT next contends that Parson did not rely on the information in Sheet No. 2B or Special Provision No. 44 in preparing its bid. The record is to the contrary. Wilson, the one responsible for preparing the bid, testified to the contrary, stating he reviewed this information, ". . . in great detail and used it to compile the heart of my entire bid." (Tr. 158-161). UDOT claims that such reliance was "misplaced and incompetent." If information in the plans and specifications is known to be so unreliable, it should not be presented at all. In pointing out that the contractor with previous experience using these prospects made the high bid, UDOT merely highlights the severe handicaps for the other bidders created by the state's misinformation.

Nothing was discussed with Parson prior to its bid concerning expanding the boundaries of Prospect 1 as depicted on Plan Sheet 2B (Tr. 471). There was nothing to suggest to Parson that all of the material could be obtained from Prospect 1, even if expanded. Accordingly, Parson's bid was based on use of both Prospects 1 and 2 (Tr. 204-206).

The next portion of the respondent's Statement of Facts, discussing Parson's contract performance, is without support. This section attempts, over eight pages, to set forth the purported failings of Parson's efforts to produce specification bituminous aggregate. However, the trial court found that this was not the cause of the problem. At most, Parson's procedures "might have contributed to the problem." Findings of Fact ("Findings") No. 20. The cause of the problem is described in the trial court's finding that the material in Prospect 2 was "of less desirable quality" to begin with and that "the amount of this material increased in depth as removal continued to the east" Finding No. 28.

UDOT mischaracterizes one of Parson's factual contentions as being that UDOT directed Parson's choice and organization of crushing equipment. Parson neither made nor makes such a contention. Parson merely pointed out the rather obvious fact that, like any other competent contractor, it

selects equipment and operating procedures based upon what it is told in the plans, specifications and other contract documents. UDOT did designate pits 1 and 2 as acceptable for use on the project. It also admitted at trial (Tr. 1012-1016) and in its brief that these were the only materials sources reasonably available. Its suggestion at page 10 of its brief that another source could have been used cannot be taken seriously.

UDOT's description of the problem Parson encountered regarding aggregate size is one of the few parts of its brief that is quite accurate. Because of the softness of the material present even after waste was rejected, attempts to crush the material that passed the number 16 screen into material retained by the number 50 screen resulted in a flour like product incapable of being retained by a number 200 screen. Hence, the excess "minus 200's" (Ex. 37-P, 38-P).

UDOT's allegations regarding the Parson stockpiles are nonsense. Specification stockpiles obviously require a source that produces specification materials. Although Mecham may have found these materials deficient, as did Parson, he had no solution either. Under the contract, Mecham was required to determine the "exact location and manner of stockpile" (Special Provision Sheet No. 44). Wilson never testified that Parson intentionally built borderline stockpiles, either on this or

any other project. In response to leading questions, Wilson indicated the obvious fact that contractors generally do not attempt to go farther than the specifications require, if to do so would cost them money (Tr. 419-422). He also indicated that on one other job Parson was confronted with stockpiles that were out of specification, not that Parson intentionally created the situation. Id. UDOT's comparison of stockpiles of deficient material taken from Prospect 2 with stockpiles from any other source, or with some "ideal" stockpile, is not probative.

Spensko's testimony cited by UDOT that 50% waste is usual for the area of the project is puzzling. This wasn't disclosed to bidders. Again, UDOT's version of the facts seems to be that only local contractors were qualified to bid.

In addition to use of blend sand, Parson also tried every other alternative suggested by the State at the time (Tr. 263-273, 281-285, 524-531). Nothing worked, at least at a cost that the State was willing to pay. It is only in hindsight that the State has fabricated the "lack of know-how" theory.

The State contends that 63 percent of the Parson reject pile would pass specifications. However, the test relied upon was taken during trial, more than one and a half years after Parson abandoned the stockpiles, and the portions

of the piles tested were not specified (Tr. 1322-1329). All the test shows is that 63 percent of the material was larger than minus 200, not that any of this material would have withstood the further crushing required to produce specification material.

Parson was basically experimenting to see whether various modifications would improve the quality of the product. None did. Wilson testified that any additional techniques simply were not workable. (Tr. 457-459).

UDOT does not dispute that as a result of the foregoing difficulties it decided to enter into a supplemental agreement with Parson (now characterized as a "concession" or "compromise") (Ex. 26-P). However, UDOT acted unreasonably by attempting to limit the scope of that agreement to the removal of 15 feet of overburden, although their own core drillings showed that 35 feet had to be removed. (Tr. 368-370).

UDOT now denies that there was 35 feet of overburden by disingenuously implying that their own test holes were drilled in the wrong locations. Two of the holes were drilled only 200 feet east of the face of the pit, rather than the 400 feet claimed in UDOT's brief (Tr. 1065). Parson assumes that UDOT drilled where it did because Parson's removal of materials was progressing eastward from the face. UDOT must have assumed the locations to be representative at the time, since it selected them.

After first denying the fact of 35 feet of overburden, UDOT then not only admits it, but it also alleges that Parson was aware of this fact. This allegation is supported only by Mecham's recollection of a post-bid conversation discussing whether there were any depth limitations on removal of material (Tr. 1298). UDOT's allegation that Parson's blasting contractor was instructed to drill to 36 feet is also not supported by its citation to the record (Tr. 1301-1302). In any event, blasts at this depth are employed to produce more material with fewer explosions, regardless of the depth of overburden.

Finally, on p. 15 of its brief, UDOT retreats to its initial position that there was only 15 feet of overburden. These are the same type of unreliable UDOT representations that Parson faced on the job and that made Parson unwilling to rely on UDOT's representation that only 15 feet of overburden was present.

Regarding use of Prospect 1, the discussion at the preconstruction conference involved whether the pit could be expanded, not whether this expansion would make available sufficient material (Ex. 132-D, 133-D). Contrary to UDOT's assertion, there is no evidence that any of the bidding contractors assumed all material could be obtained from Prospect 1. UDOT's citation to Tr. 1580-1586 is entirely off point. At

Tr. 1587 one of the contractors testified that he planned to begin operations in pit no. 1, not that he intended to get all of his materials from there. More importantly, Parson offered to move to pit no. 1, even though it felt that pit no. 1 did not contain sufficient material. (Ex. 29-P).

The reason set forth by UDOT for Spensko's refusal to test the BLM property to the north of Prospect 2 is unacceptable. Spensko assumed that the material seen from a surface inspection was representative of the material behind the face. Of course this is the same mistaken assumption he made regarding Prospect 2. Also, at the time he was making this assumption, Spensko was aware of overburden 28 feet deep on the BLM property (Tr. 1080-1081). On page 15 of its brief, UDOT states that a subsequent contractor used the BLM property to complete the work. That allegation is totally improper since it raises facts entirely outside of the record on appeal. Moreover, like other UDOT representations, this one is also totally misleading. UDOT relaxed specifications for the new contractor, despite a contract price nearly twice as high as Parson's. What the record shows is that the BLM property was not made available to Parson until too late, and that UDOT subsequently corrected its representations concerning site conditions to

show the softness and variation of the material likely to be encountered. (Tr. 381-383; Ex 183-P).

The letter cited by UDOT as making it "clear" that Parson could have used the BLM property "prior to formal written permission" says no such thing. All it does is estimate when future BLM approval might be obtained (Ex. 30-P). The only "guarantee" Parson asked for regarding the BLM property was the same one it requested regarding prospect No. 2, that UDOT stand behind its representations. UDOT consistently refused to do so.

The final section of UDOT's Statement of Fact alleges Parson responsibility for failing to discover the information UDOT had scattered throughout its files. As will be argued more fully below, where the government makes affirmative misrepresentations rather than merely withholds facts, failure of the contractor to inspect referenced documents will not allow the government to avoid liability. As discussed elsewhere, there were numerous affirmative misrepresentations or misleading statements in the contract documents.

This latter part of UDOT's factual presentation is similar to the earlier parts, factually inconsistent and unsupported by the record. In some places UDOT alleges that the withheld information was extremely important and so Parson was

remiss in not hunting for it. In other places it alleges that the information was unimportant and so was not included in the plans and specifications. On the one hand UDOT asserts that the plans and specifications accurately portrayed Prospect 2. On the other it argues that review of the documents on file would have revealed the problems Parson subsequently encountered.

UDOT responds to the high wear test results in its files by stating that Prospect 2 had already produced specification materials for other contractors. Of course, as discussed above, these specifications were easier to meet than the ones applicable to Parson (Special Provision Sheets 31 & 32). Moreover, these other contractors had great difficulty obtaining competent material, leading to the express recommendation that the pit not be used in the future (Tr. 1194-1195; Ex. 81-P; Tr. 861-862).

UDOT's claim that soft material makes for "easy crushing" avoids the issue. Whether the material is hard or soft, the information provided by the State must be accurate in order for the contractor to prepare a fair bid and perform the contract adequately. From Sheet 2B and Special Provision 44 one might expect 10-15 percent of the material would be too soft for specification, but no one would expect virtually <u>all</u> of the material to fall in that category.

UDOT finally gets to the heart of the matter when it admits at p. 17 of its brief that there was "no known alternative" to these material sources. Spensko's cited testimony makes it clear that the reason he ignored the advice of a prior UDOT project engineer to find another location and the reason he defined the material in these sources as being of "excellent quality" is that there was no other alternative (Tr. 1012-1016). UDOT decided to use these sources regardless of their quality.

UDOT's description of Spensko's tests show their defects. They were done only on the face of the pits, on the apparent assumption that the material behind the face was the same (notwithstanding UDOT's allegations that Parson was negligent in failing to discover this material was not the same). Had Spensko followed the testing pattern required by UDOT's regulations, he would have discovered that the material was not the same. Thus, it was not "realistic" to decide not to do further testing. Spensko's rationalizations for this decision again show that UDOT intended to use these pits regardless of what the tests showed (Ex. 92-B, Tr. 1000-1013, 1021-1022). Spensko's complaint of inadequate time to do further testing especially rings hollow, in light of the degree of testing and pre-bid investigation UDOT now claims Parson should have performed in a shorter period of time.

Interestingly enough, Spensko states that his decision not to discose the "historical" information in UDOT's files was because specification changes gave the information questionable value (Tr. 1028-1029). This is the same information cited by UDOT in claiming other contractors had "successfully" used Prospect 2 and in claiming that Parson's pre-bid investigation was negligent. Much of this "historical" information is not even referenced by the contract documents.

The UDOT employee who performed the L.A. Rattler test after Parson commenced performance came to the site at the request of the UDOT project engineer who indicated there was a problem with material breakdown (Tr. 883-901). Even with the margin for error alleged by UDOT, the test result significantly exceeded the 40% maximum (Tr. 895-902). The fact that the UDOT employee "informed" no one of this result hardly exculpates UDOT, especially since the test was filed in UDOT files. In November, this same employee again tested pit no. 2 at UDOT's direction, and again received an L.A. Rattler result in excess of 40% (Tr. 902-908). This time Spensko was told of the results. The record established that numerous variables affect the outcome of L.A. Rattler tests. However, the independent tests Parson had perfomed were consistent with the UDOT tests taken about the same time, in showing a severe wear problem in Prospect No. 2 (Tr. 289-304, 600-604; Ex. 35-P).

Recognizing the "problems" with the designated sources for this project, UDOT specifically requested aid from the Federal Highway Administration indicating the materials had been "incorrectly identified" (Ex. 101-P). The fact that, at the time, Taylor did not realize the effect of his admission against interest that UDOT "incorrectly identified" the materials in Prospect 2 does not make that admission any less important. Since FHWA did realize the effect of that admission, it indicated UDOT would be responsible for any increased expense (Ex. 102-P).

Finally, UDOT completely mischaracterizes the testimony of its witnesses concerning the geology of the area. At several places in Swapp's testimony he notes the possibility of faulting (Tr. 1475-1476, 1483). Spensko and Lund could not tell whether there was faulting or not, although Lund indicated that the evidence was highly suggestive of faulting (Tr. 1092 et. seq., 1723 et. seq.). All three men relied largely upon aerial photographs that, as Waggoner explained, were optically deceiving (Tr. 812). Swapp had not worked in that area in ten years and Lund had never visited the job site.

Thus, Waggoner's testimony (Tr. 767-784) as to the sudden and unforeseeable change in the character of Prospect 2 stands unrebutted, as does the testimony of Neff (Tr. 899-918)

on the numerous varieties of materials in Prospect 2 other than limestone. UDOT attempts to shrug this latter point off by claiming that this was a mere withholding of information otherwise discoverable by Parson. Instead, it is a positive misrepresentation. UDOT did not merely indicate that Prospect 2 was in a limestone formation or that limestone was among the materials contained in the prospect. It stated "this prospect consists of limestone ledgerock" which was untrue.

ARGUMENT

This case is squarely controlled by Thorn Construction Co., Inc. v. UDOT, 598 P.2d 365 (Utah 1979). UDOT acknowledges this fact by urging the court to overrule Thorn. Under Thorn, a contractor may recover when, acting reasonably, he is mislead by incorrect plans and specifications issued as the basis for bids. As discussed below, each of these elements is present in the instant case: UDOT's statements were materially incorrect; Parson acted reasonably; and UDOT's statements were both intended to be relied upon and were relied upon as the basis for bids.

I. UDOT Made Numerous False and Misleading Statements.

UDOT made numerous affirmative misrepresentations and/or misleading statements in the contract documents, including:

(1) that Prospect 2 was "acceptable in general" [Standard Specification Subsection 106.02(a)];

(2) that Prospect 2 "consists of limestone ledge-rock" (Special Provision Sheet No. 44);

(3) that other contractors had used Prospect 2 (implying successful use) (Special Provision Sheet No. 44; and

(4) that test results (impliedly performed in accordance with UDOT requirements) indicated Prospect 2's suitability (Plan Sheet No. 2B).

Evidence explored above, along with the Findings of the court, establish the falsity of this information. In particular, the Finding that the material first encountered was poor and subsequently became worse contradicts almost every one of these representations (Finding No. 28). There was no representative sampling, as UDOT contends. Only the information reflecting favorably on use of Prospect 2 was provided. The decision of the trial court was not based on the accuracy of UDOT's representations, but on the mistaken view that UDOT was not bound by its representations (Conclusion No. 6).

In another example of the unreliable information Parson has received from UDOT throughout the controversy, UDOT claims on page 22 of its brief that "pit 2 contained suitable

material but required careful quality control in aggregate production" and that a prior contractor "by contrast was careful and selective in the material and methods it used and succeeded where appellant failed." Based on personal knowledge rather than UDOT representations, that same contractor bid $650,000 higher than Parson on the project at issue (Ex. 6-P).

Clearly, the instant controversy falls squarely within the scope of Thorn. If anything, the instant case is an even stronger case for the contractor. Thorn involved one general oral representation; here there are several affirmative representations in the written contract documents specifically relating to performance of the specifications. There is no basis for the State's rather revealing request that Thorn be "disregarded, if not specifically overruled."

II. Parson Had No Duty to Discover the Falsity of UDOT's Representations.

As stated above, Thorn requires the contractor to act reasonably. UDOT suggests this imposed upon Parson a duty to discover, by availing itself of UDOT's files and other information, the falsity of UDOT's representations. This is not the law.

A distinction must be made between cases such as the instant one, in which the State makes a positive, material misrepresentation, and those cases in which the State merely provides insufficient information without misrepresenting a material fact.

Flippin Materials Co. v. U.S., 312 F.2d 408 (Ct. Cl. 1963), relied upon heavily by UDOT, aptly illustrates this distinction. There, the contractor's claim was based upon the government's failure to make a representation, and not on a governmental misrepresentation. The government prevailed based on the contractor's failure to inspect government referenced documents. Significantly, at page 413, note 7, the court made it clear that had the claim been for a misrepresentation, such misrepresentation would not be excused by general warnings to review or inspect documents. Tri-County Excavating, Inc. v. Borough of Kingston, 407 A.2d 462 (Pa. 1979), also relied upon by UDOT, explicitly distinguishes its facts from cases of misrepresentation ("constructive fraud").

In fact, UDOT does not cite a single case in which the government made a material misrepresentation; it cites only "silence" cases. See, e.g., Highland Construction Co. v. Stevenson, 636 P.2d 1034 (Utah 1981), L.A. Young Sons Construction Co. v. County of Tooele, 575 P.2d 1034 (Utah 1978), R. C. Tollman Construction Co. v. Myton Water Association, 563 P.2d

780 (Utah 1977), and J.A. Thompson & Sons, Inc. v. Hawaii, 465 P.2d 148 (Hawaii 1970). The misrepresentation cases hold that failure to inspect referenced documents does not make a contractor's reliance upon governmental representations unreasonable. See, e.g., Stock & Grove, Inc. v. U.S., 493 F.2d 629 (Ct. Cl. 1974); Haggart Construction Co. v. State Highway Commission, 427 P.2d 686 (Mont. 1967).

Thorn clearly established that a contractor in Utah has no duty to discover the falsity of positive assertions, regardless of the UDOT disclaimer. Quoting from Hollerbach v. U.S., 233 U.S. 165, 172 (1914), this court stated:

> We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the government as a basis of the contract left in no doubt. . . . In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to reply [sic] without an investigation to prove its falsity. 598 P.2d at 368 (Emphasis added).

This rule particularly applies where, as here, the contractor has insufficient time to conduct such an investigation. See, e.g., Haggart, supra, (2 weeks); Canty Asphalt, Inc. v. State, 337 N.Y.S. 2d 415 (N.Y. 1972) (3 weeks). Parson had less than three weeks to conduct the elaborate pre-bid investigation argued for by UDOT.

Finally, this distinction is a fair one. A party who has made representations for the obvious purpose that they be believed and relied upon may not avoid liability by arguing that the deceived party should not have believed and relied upon them. Yet this is what UDOT is arguing. Of course this argument assumes that the representations in question were false, or, at any rate, so misleading as to cause an inaccurate bid. UDOT is inconsistently asserting on the one hand that the plans and specifications accurately portrayed Prospect 2, and, on the other, that reliance upon that portrayal was unreasonable because contradicted by documents on file. In fact, although the information was inaccurate, the positive, affirmative way in which it was presented in the contract documents made reliance upon it eminently reasonable.

UDOT attempts to circumvent these well-established principles by blatantly mischaracterizing Wunderlich v. California, 423 P.2d 584 (Cal. 1967). UDOT states at page 25 of its brief that a contractor cannot recover unless the state "knowingly" misrepresents or "intentionally" withholds. Wunderlich merely holds that the information must be "within the State's knowledge", not that the State must act knowingly or intentionally. Wunderlich does establish that a disclaimer is effective only when there has been no misrepresentation or withholding of critical information.

III. Sheet No. 2B and the Other Documents Relied Upon by Parson Were Offered and Received as Part of the "Basis for the Bid".

Thorn allows a contractor to recover where he is "misled by incorrect plans and specifications issued by the public authorities as the basis for bids . . .", 598 P.2d at 368. Under Thorn, as pointed out in appellant's initial brief, the trial court's interpretation that Sheet No. 2B was not a document that could be relied upon was a fundamental error of law.

More important than a technical definition of "plans" or "specifications" is whether the incorrect information was intended to be relied upon as the basis for bids. UDOT makes the technical argument in an attempt to circumvent Thorn contending that the written material is not included within the formal "plans and specifications".

The evidence clearly establishes that Sheet No. 2B and Special Provision No. 44 were relied upon by Parson as a basis for its bid. These documents confirmed the misrepresentation that the material was acceptable in general. Sheet 2B was presented in such a way as to leave no doubt that UDOT intended it to be relied on as the basis for bids. It was bound to and indistinguishable from the plans and specifications, and included a technical description of Prospects 1 and 2. The State should not have supplied Sheet 2B at all if it was not to be used in bidding.

Resolution of this issue is much easier here than in Thorn, where the court held that a contractor had a right to rely upon an oral representation. Certainly an oral representation is much less likely to be construed as part of the plans and specifications or the basis for bids than a written document like Sheet No. 2B. Of course, the most significant misrepresentations made by UDOT were contained in Special Provision No. 44, which UDOT does not dispute was a part of the plans and specifications.

Parson's right to rely is unaffected by whether Subsection 104.02 (authorizing supplemental agreements) is a "true" changed conditions clause. UDOT's attempts at pages 40-45 of its brief to distinguish Fattore v. Metropolitan Sewer Comission of Milwaukee, 454 F.2d 537 (7th Cir., 1977) and Stock & Grove, Inc. v. United States, 493 F.2d 629 (Ct. Cl. 1974) on the basis that these cases involved "true" changed conditions clauses, are futile. As Thorn shows, the principles followed in these cases apply whether or not there is a changed conditions clause.

On the other hand, UDOT's cite to Jack B. Parson Construction Co. v. State of Utah, 552 P.2d 107 (Utah 1976), as a case interpreting Subsection 104.02, is gratuitous. That case did not become relevant simply because Parson was a

party. There, the only issue was the amount of the computation under a Subsection 104.02 supplemental agreement, not the question of what work was covered. UDOT's proferred interpretation of this provision ignores or defies all of the rules of construction discussed in Parson's first brief. UDOT also conveniently ignores its own interpretation of this provision during Parson's attempted performance, when UDOT expressly agreed to enter into a "supplemental agreement" (Ex. 26-P). Parson was entitled to a supplemental agreement and, when it was no longer financially capable of going forward, it was entitled to suspend performance. Metropolitan Sewerage Com'n. v. R.W. Construction, 241 N.W. 2d 371 (Wisc. 1976).

CONCLUSION

Parson is aware of no jurisdiction, including this one, that follows the rule proposed by UDOT and adopted by the trial court. This rule would require contractors to bear all risk of governmental misrepresentations in contract documents. In addition to the inherent unfairness of such a rule, there is an obvious policy barrier. If UDOT's position is adopted and the trial court is affirmed, bidders will be required to inflate their bids as a hedge against governmental misrepresentations. This frustrates the whole purpose of competitive bidding for public contracts, which is to obtain the lowest reasonable contract price.

As UDOT points out, the decision of the district court here and that of this court in Thorn cannot stand together. The only way that the Court can ratify the strong principles behind Thorn is to reverse the decision of the district court.

RESPECTFULLY SUBMITTED this 3rd day of August, 1983.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 1983, I served two copies of the foregoing Reply Brief of Appellants upon Leland D. Ford, Assistant Attorney General, 115 State Capitol, Salt Lake City, Utah 84114, by hand delivery.

PRINCE, YEATES & GELDZAHLER

By Anne Carr

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